NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR08-1119

JERRY CHAMPION APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** APRIL 15, 2009 APPEAL FROM THE UNION COUNTY CIRCUIT COURT, [NO. CR-07-555-1] HONORABLE HAMILTON HOBBS SINGLETON, JUDGE AFFIRMED

RITA W. GRUBER, Judge

Jerry Champion was convicted by a jury of aggravated robbery and sentenced to twenty years' imprisonment. On appeal, he contends that the trial court erred by refusing to instruct the jury on the lesser-included offense of robbery. We find no error and affirm Champion's conviction.

The victim, Jack Higgins, testified that on July 30, 2007, he parked his truck in front of the NAPA store in Strong in order to sell tomatoes out of the back of his truck. At about 8:00 p.m., while he was behind the shop reading the writing on an eighteen-wheeler parked there, he was approached by Champion, whom Mr. Higgins had never seen before. Mr. Higgins testified that they spoke for a moment and then Champion asked him if he wanted to "buy any weed." Mr. Higgins said, "No." Mr. Higgins said that, after Mr. Higgins turned around to continue reading, Champion put a pocket knife to his throat and

demanded his money. Mr. Higgins testified that he reached into his right pocket, pulled out a twenty-dollar bill and a ten-dollar bill, and gave them to Champion. He said that Champion took off on foot into the woods behind the store. He testified that Champion was wearing shorts, a white t-shirt, a ball cap, and tennis shoes. Mr. Higgins testified that he immediately went to his truck and called 911 to report what happened. Before the sheriff's department arrived, Champion returned on a four-wheeler and parked by the eighteen-wheeler.

When Officer Sanders arrived, he saw a man matching the description he had received sitting on a four-wheeler next to an eighteen-wheeler about fifty yards from Mr. Higgins's truck. Officer Sanders testified that he asked the man, Champion, to step off of the four-wheeler, and he performed a pat-down search for weapons. He testified that, after a thorough search, he did not find any weapons. He said that Champion kept asking him what was going on; then, while he was performing the search, Mr. Higgins walked up and indicated that Champion was the man who robbed him. Champion twisted away from Officer Sanders and started running away. Officer Sanders testified that the only evidence they discovered was a small bag of what looked like yard clippings near the four-wheeler.

Champion testified that he approached Mr. Higgins, who asked Champion what an ounce of weed would cost. Champion said that he told Mr. Higgins he could probably get one for about sixty bucks. He testified that Mr. Higgins said that sixty bucks was too much but that he could pay thirty bucks for a half of a quarter ounce. Mr. Higgins pulled a roll of money from his pocket and gave Champion a twenty and a ten and asked Champion to

hurry back. Champion testified that he left on foot and came back on a four-wheeler. He said he brought back a bag of plain grass in a zip-lock bag. He said that he did not approach Mr. Higgins's truck because he saw the deputy. He also testified that he did not have any weapons, that he did not put a knife to Mr. Higgins's throat, and that he did not demand money from Mr. Higgins.

At the conclusion of the trial, Champion proffered an instruction on the lesser-included offense of robbery. The court denied Champion's request, finding that there was no proof of robbery, stating that "[i]t's either one or the other." The jury convicted Champion of aggravated robbery. His sole point on appeal is that the trial court erred in denying his request to instruct the jury on the lesser-included offense.

No right has been more zealously protected by this court than the right of an accused to have the jury instructed on lesser-included offenses. *Brown v. State*, 347 Ark. 44, 47, 60 S.W.3d 422, 424 (2001) (citing *Rainey v. State*, 310 Ark. 419, 837 S.W.2d 453 (1992)). It is reversible error to refuse to give an instruction on a lesser-included offense when the instruction is supported by even the slightest evidence. *See Ellis v. State*, 345 Ark. 415, 47 S.W.3d 259 (2001). Thus, we will affirm the trial court's decision to exclude an instruction on a lesser-included offense only if there is no rational basis for giving the instruction. *Brown*, 347 Ark. at 47, 60 S.W.3d at 424.

Robbery is a lesser-included offense of aggravated robbery. *Brown*, 347 Ark. at 47, 60 S.W.3d at 425. A person commits robbery if, "with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately thereafter, the person employs

or threatens to immediately employ physical force upon another person." Ark. Code Ann. § 5-12-102(a) (Repl. 2007). A person commits aggravated robbery when he commits robbery and is armed with a deadly weapon, represents by word or conduct that he is so armed, or inflicts or attempts to inflict death or serious physical injury upon another person. Ark. Code Ann. § 5-12-103(a) (Repl. 2007). Generally, a robbery instruction is required when the charge is aggravated robbery. *Isom v. State*, 356 Ark. 156, 184, 148 S.W.3d 257, 276 (2004); *Henson v. State*, 296 Ark. 472, 474, 757 S.W.2d 560, 561 (1988). The exception to the general rule is when the evidence is so conclusive as to show that only aggravated robbery could have been committed. *Brown*, 347 Ark. at 48, 60 S.W.3d at 425.

In *Henson* the supreme court reversed the trial court's refusal to give a robbery instruction where the evidence showed that Henson put his hand in his pocket after he was surprised in the act of emptying a safe. The victim thought Henson was reaching for a gun but never saw a weapon. The court held the jury should have been afforded the opportunity to believe all or just part of the testimony of the chief prosecuting witness. 296 Ark. at 473, 757 S.W.2d at 561. The court also reversed a trial court's refusal to give a robbery instruction in *Brown v. State*. The court based its decision that there was a rational basis for the lesser-included instruction on the facts that the victim testified that she thought the gun was fake and that only a BB gun was recovered from Brown's apartment. 347 Ark. at 49, 60 S.W.3d at 426.

The supreme court affirmed the trial court's refusal to give a robbery instruction in *Tarkington v. State*, 313 Ark. 399, 855 S.W.2d 306 (1993), holding that the trial court did not

err because there was no proof presented that Tarkington did not have a weapon during the robbery. In response to the victim's testimony at trial that Tarkington held a knife on her and forced her to open the safe at work and hand him the money and the officer's testimony that a knife was removed from Tarkington's pocket after he was stopped, Tarkington testified that he did not remember anything about the time period in question and could not dispute what the witnesses against him said. *Id.* at 401–02, 855 S.W.2d at 308.

In *Doby v. State*, 290 Ark. 408, 720 S.W.2d 694 (1986), the court held when a defendant asserts that he is entirely innocent of any crime, no rational basis exists to instruct the jury on a lesser-included offense. The court reasoned in *Doby*:

> Doby rested his entire defense on his credibility against that of the officers. So as a practical matter, it came down to whom should the jury believe. There would be no rational basis to find the officers lied in part in this case. Their testimony so sharply conflicted with Doby's that it would not be reasonable to expect a jury to pick and choose and come up with a finding of a lesser offense when to do so would require a finding that Doby was a liar and the officers liars in part. If Doby had admitted possessing the drugs, it might make sense to require the charge of the lesser offense. But his defense was that he was entirely innocent of any crime: he possessed nothing. Therefore, the jury only had one question to decide, whether he was guilty as charged.

290 Ark. at 412, 720 S.W.2d at 696. We followed *Doby* in *Nichols v. State*, 69 Ark. App. 212, 11 S.W.3d 19 (2000). In *Nichols*, one of the appellants argued that the trial court erred in refusing to instruct the jury on the lesser-included offense of robbery. We affirmed the trial court's refusal because the appellant's defense was based on a denial of all charges and "it would not have been reasonable to expect the jury to convict [him] of lesser-included offenses when to do so would have required the finding that [he] was untruthful and the victim was untruthful in part." *Id.* at 216, 11 S.W.3d at 22.

In this case, as in *Doby*, Champion's instruction request was inconsistent with his own proof. Champion denied that he committed a robbery at all; his defense was that he was innocent of any crime. The victim unequivocally testified that Champion robbed him with a knife. A conviction by the jury of the lesser-included offense of robbery would have required a finding that Champion was untruthful and that the victim was untruthful in part. We hold that there was no rational basis for giving the robbery instruction, and we affirm.

Affirmed.

GLOVER and MARSHALL, JJ., agree.